SUPREME COURT, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

No. 91-1747

In The

Supreme Court of the United States

October Term, 1991

WESTERN FARM CREDIT BANK,

Petitioner,

v.

ELMER FOBIAN AND ELSE FOBIAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE *AMICUS CURIAE* APPLICANTS (SEE ATTACHED LIST) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Amicus Curiae Applicants

1. Associated General Contractors of California, Inc. ("AGC"), is a nonprofit trade association organized under the laws of the State of California. AGC has approximately 700 contractor members who act as general contractors and subcontractors on both public and private construction projects. AGC also maintains an associate membership category, which includes approximately 750 businesses which perform specialized services for the construction industry in California. AGC is informed and believes that its contractor members perform the majority of the non-residential construction in the State of California, including public works construction governed by the prevailing wage requirements of the California Labor Code.

2. Campbell Construction Company is a California corporation, headquartered in Sacramento, California.

3. The Chase Manhattan Bank, N.A., is a national banking association, headquartered in New York, New York.

4. GE Capital – Private Label Bankruptcy Operation is a national private label financing operation, headquartered in Orange, California.

5. Stockmans Bank of Commerce is a California State Bank, headquartered in Elk Grove, California.

6. Tri Counties Bank is a California State Bank, headquartered in Chico, California.

7. Tri State Livestock Credit Corporation is a California lending institution, headquartered in Sacramento, California.

Amicus curiae applicants listed below as Nos. 8 through 36 are federal instrumentalities and members of the Farm Credit System. They are farmer owned and

managed cooperatives that provide funding to American farmers, ranchers, and harvesters of aquatic products.

8. AgriBank, FCB, successor of the Farm Credit Banks of St. Paul and St. Louis, headquartered in St. Louis, Missouri, serving agricultural borrowers in Illinois, Missouri, Arkansas, Michigan, Wisconsin, Minnesota and North Dakota;

9. Arizona Agricultural Credit Association, headquartered in Tempe, Arizona, serving agricultural borrowers in Arizona;

10. Central Coast Federal Land Bank Association, FLCA/Central Coast Production Credit Association, headquartered in Arroyo Grande, California, serving agricultural borrowers in the central coast region of California;

11. Central Valley Production Credit Association, headquartered in Turlock, California, serving agricultural borrowers in the central valley region of California;

12. Colonial Farm Credit, ACA, headquartered in Mechanicsville, Virginia, serving agricultural borrowers in the area;

13. Eastern Idaho Agricultural Credit Association, headquartered in Pocatello, Idaho, serving agricultural borrowers in twenty-four counties in Southern and Eastern Idaho and two counties in Wyoming;

14. Farm Credit Bank of Spokane, headquartered in Spokane, Washington, serving agricultural borrowers in Washington, Oregon, Montana, Idaho and Alaska;

15. Farm Credit Bank of Springfield/Springfield Bank for Cooperatives, headquartered in Springfield, Massachusetts, serving agricultural borrowers in Maine, New Hampshire, Vermont, Massachusetts, Rhode

Island, Connecticut, New York and New Jersey, serving agricultural cooperatives throughout the United States of America;

16. Farm Credit of the Connecticut Valley, ACA, headquartered in White River Junction, Vermont, serving agricultural borrowers in the area;

17. Farm Credit of North Central Jersey, ACA; Farm Credit of South Jersey, ACA; Farm Credit of Rancocas, ACA; headquartered in New Jersey, collectively serving agricultural borrowers in New Jersey;

18. Farm Credit of North Central New York, ACA, headquartered in Morrisville, New York, serving agricultural borrowers in the north central region of New York;

19. Farm Credit of Western New York, ACA, headquartered in Batavia, New York, serving agricultural borrowers in the western region of New York;

20. Federal Intermediate Credit Bank of Jackson, headquartered in Jackson, Mississippi, serving agricultural borrowers in Alabama, Mississippi and Louisiana;

21. Federal Land Bank Association of Hawaii, headquartered in Honolulu, Hawaii, serving agricultural borrowers in Hawaii on behalf of its principal, Petitioner Western Farm Credit Bank;

22. Federal Land Bank Association of Kingsburg, FLCA, headquartered in Kingsburg, California, serving agricultural borrowers in the area;

23. Federal Land Bank Association of Visalia, FLCA; Federal Land Bank Association of Bakersfield; Production Credit Association of Visalia and Production Credit Association of Bakersfield, headquartered in Visalia, California, collectively serving agricultural borrowers in the area;

24. Federal Land Bank Association of Yosemite, FLCA, headquartered in Turlock, California, serving agricultural borrowers in the area;

25. First South Production Credit Association, headquartered in Jackson, Mississippi, serving agricultural borrowers in the area;

26. Fresno-Madera Production Credit Association, headquartered in Fresno, California, serving agricultural borrowers in the area;

27. Hawaii Production Credit Association, headquartered in Honolulu, Hawaii, serving agricultural borrowers in Hawaii;

28. Hudson Valley Farm Credit, ACA, headquartered in Albany, New York, serving agricultural borrowers in the area;

29. Intermountain Federal Land Bank Association, FLCA; Sierra Nevada Production Credit Association, headquartered in Reno, Nevada, collectively serving agricultural borrowers in Nevada and northeast California;

30. Mohawk-Schoharie Farm Credit, ACA, headquartered in Fultonville, New York, serving agricultural borrowers in the area;

31. Northern California Federal Land Bank Association, FLCA; Northern California Production Credit Association, headquartered in Chico, California, collectively serving agricultural borrowers in the area;

32. Northwest Farm Credit Services, ACA, headquartered in Spokane, Washington, serving agricultural borrowers in Washington, Oregon, Montana, Idaho and Alaska;

33. Pacific Coast Farm Credit Services, ACA, headquartered in Windsor, California, serving agricultural borrowers in the area;

34. Sacramento Valley Production Credit Association, headquartered in Woodland, California, serving agricultural borrowers in the area;

35. Sierra Bay Federal Land Bank Association, FLCA; Sierra Bay Production Credit Association, headquartered in Stockton, California, serving agricultural borrowers in the area;

36. Susquehanna Valley Farm Credit, ACA, headquartered in Oneonta, New York, serving agricultural borrowers in the area.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* APPLICANTS

Pursuant to Rule 37 of the rules of this Honorable Court, the applicants listed above respectfully submit this brief as *amicus curiae* in support of WESTERN FARM CREDIT BANK's (the "BANK") Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991).

The *amicus curiae* applicants are vitally interested in the proper disposition of this case in that it raises a current issue of broad importance to them and the industries they represent. They are concerned that *Fobian* will increase uncertainty in bankruptcy proceedings, create unnecessary and costly litigation, encourage forum shopping, and provide windfalls to solvent debtors at the expense of creditors.

ARGUMENT

I.

THE BANK IS ENTITLED TO ATTORNEYS' FEES UNDER STATE LAW AND MAY PROPERLY CLAIM SUCH FEES IN BANKRUPTCY

The BANK has an allowable claim for attorneys' fees against the solvent Respondents, ELMER and ELSE FOBIAN (the "FOBIANS"), pursuant to the attorneys' fees provisions in the Note and Deed of Trust.[1] *See, e.g., In*

[1] The promissory note executed by the FOBIANS in favor of the BANK provides:

(Continued on following page)

the Matter of Sparkman, 703 F.2d 1097, 1099 (9th Cir. 1983). It is well established that the validity of a claim in bankruptcy must be determined according to state law. The Bankruptcy Code ("Code") defines a claim as a right to payment, 11 U.S.C. Section 101(5)(A), and requires the court, upon objection, to disallow claims to the extent that they are unenforceable under any agreement or applicable law. 11 U.S.C. Section 502(b)(1).[2] Furthermore,

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> Each of the undersigned . . . agrees to pay reasonable attorneys' fees and costs incurred in collection of payment due, or in the enforcement of any right or remedy hereunder.

The deed of trust executed by the FOBIANS in favor of the BANK also contains a provision for attorneys' fees. The deed of trust provides:

> (3) Beneficiary may . . . (b) appear in and litigate any matters, *including condemnation and bankruptcy proceedings*, affecting the security of lien, and may incur necessary costs, expenses and attorneys' fees therefor . . . which advances, together with interest accrued thereon shall be immediately due and payable. . . . (Emphasis added.) See BANKS's Petition for Writ of *Certiorari*, page 7.

[2] This section provides as follows: "(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that –

(Continued on following page)

the construction of a clause in a note or mortgage providing for attorneys' fees is a matter of state law. *See Security Mortgage Co. v. Powers*, 278 U.S. 149, 153-154, 49 S.Ct. 84, 73 L.Ed. 236, 240 (1928); *In re Morris*, 602 F.2d 826, 829 (8th Cir. 1979); *In re Atlanta International Raceway Inc.*, 513 F.2d 546, 548 (5th Cir. 1975); *In re Eastview Estates II*, 713 F.2d 443, 447 (9th Cir. 1983); *In re Sparkman, supra*, 703 F.2d at 1099 (9th Cir. 1983); *Transouth Financial Corp. of Florida*, 931 F.2d 1505, 1507 (11th Cir. 1991); *In re United Merchants*, 674 F.2d 134, 137 (2nd Cir. 1982); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985); *In re Banks*, 31 B.R. 173, 175 (Bkrtcy. N.D. Ala. W.D. 1982); *In re Foster*, 38 B.R. 639, 642 (Bkrtcy. M.D. Tenn. 1984).

The Supreme Court has held that property rights, created and defined by state law, are to be respected in bankruptcy absent express language in the Code to the contrary. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed. 2d 136 (1979).[3] There is no express language in the Code that prohibits an unsecured or undersecured creditor to claim post-petition attorneys' fees as part of its claim. Under 11 U.S.C. Section 506(b) the Court may determine whether the claim for fees shall be allowed as part of the secured claim. Section 506(b)

(Continued from previous page)

> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . "

[3] Although the property right in the *Butner* case is not a contractual claim for attorneys' fees but a mortgagee's claim to rents and profits, the term *property right* includes an unsecured debt (see *Lawrence T. Lasagna, Inc. v. Foster*, 609 F.2d 392, 394 (9th Cir. 1979)) and the term *debt* is defined as *liability on a claim*. 11 U.S.C. Section 101(12).

does not address whether an unsecured or undersecured creditor has a claim for attorneys' fees as part of its unsecured claim. The statutory basis for the allowance of these fees is provided for in 11 U.S.C. Sections 101(5)(A) and 502(b).

The Supreme Court in *Butner* stated as follows:

> Unless some federal interest requires a different result, there is no reason why such [property] interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both State and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' (Citations) . . . [F]ederal . . . bankruptcy courts should take whatever steps are necessary to ensure that the creditor is afforded in federal court the same protection it would have under state law if no bankruptcy had ensued.

William E. Butner v. United States, supra, 440 U.S. 48, 55-56, 99 S.Ct. 914, 59 L.Ed.2d 136, 142.

Under California law, the BANK's claim for attorneys' fees would be allowed. California Code of Civil Procedure Section 1021 provides the basic right for such fees. The statute reads:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . .

Under this statute, the allocation of attorneys' fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions

alone. *See Anthony Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338 (1992). In the *Xuereb* case, the jury was presented with issues involving negligence, products liability and fraud. In addition, Plaintiff requested attorneys' fees pursuant to a purchase agreement which contained the following attorneys' fees clause:

> If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto, including Agent, the prevailing party shall be entitled to recover actual court costs and reasonable attorney's fees in addition to any other relief to which such party may be entitled.

Id. at 1340.

The court granted the Plaintiff's request for attorneys' fees stating that "Code of Civil Procedure Section 1021 provides the basic right for attorneys' fees . . . " The *Xuereb* court further stated:

> Under this statute, the allocation of attorney fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions alone. It is quite clear from the case law interpreting Code of Civil Procedure section 1021 that parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract. (Citations.)

Id. at 1341.

In the *Fobian* case, the parties expressly agreed that the BANK was authorized to litigate matters in bankruptcy proceedings to collect the debt and that these fees shall be immediately due and payable, together with the original debt. Under California law, the BANK has a property right to the payment of its reasonable attorneys'

fees incurred in litigating any matters in this bankruptcy proceeding. This determination is reinforced by the "American Rule" that attorneys' fees are properly awarded to a prevailing party in federal court if there exists a statute or valid contract that provides for them. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475, 478 (1967), and *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 257, 95 S.Ct. 1612, 44 L.Ed.2d 141, 153 (1975).

Furthermore, allowing the BANK its claim for reasonable fees against the solvent FOBIANS does not conflict with any other section of the Code, or with the fundamental bankruptcy principles of providing a fresh start to the debtor and fair treatment to all creditors.

II.

GIVEN THE FOBIANS' SOLVENT STATUS, THE BANK SHOULD HAVE A CLAIM IN BANKRUPTCY FOR ITS ATTORNEYS' FEES

The FOBIANS are solvent debtors with substantial net worth. They filed their Chapter 12 Bankruptcy Petition to pressure the BANK, their only unpaid creditor, into accepting real property collateral or a 40 year promissory note, each worth $70,500.00, in full satisfaction of a $191,660.09 debt.[4] In so doing, the FOBIANS ran afoul of

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[4] In their Plan, the FOBIANS proposed to either "refinance" the $191,660.09 debt in exchange for a new 40 year $70,500 promissory note, or to surrender real property collateral to the BANK in full satisfaction of the debt. The real property was by the FOBIANS' own admission worth $70,500. The BANK did not elect either alternative in the Plan. The FOBIANS then elected the second alternative, surrender of the property. *In re Fobian, supra*, 951 F.2d at 1150-1152.

two of the most fundamental principles underlying bankruptcy law. First, the FOBIANS sought not only a "fresh start," but a head start at the expense of the BANK.[5] Second, the FOBIANS failed to propose a Plan providing fair and equitable treatment of the BANK's claims.

The Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") and the Ninth Circuit Court of Appeals agreed with the BANK'S objection to the FOBIANS' Plan and required that the Plan provide for payment of the unsecured portion of the BANK's claim. However, that portion of the BANK'S claim for attorneys' fees was denied despite contractual provisions in the loan documents that expressly provided for attorneys' fees in the event the BANK was forced to protect its financial interest in a bankruptcy proceeding.[6]

The fundamental principles of bankruptcy referenced above were further violated when the FOBIANS proposed to entirely avoid their expressly-bargained-for attorneys' fees obligation. When debtors are solvent or when the dispute is between a creditor and a debtor, courts generally award unsecured creditors their attorneys' fees. This results, in part, from policy considerations similar to those present in the context of allowance

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[5] Focusing on the first principle when he introduced the consumer bankruptcy reform package to Congress on June 29, 1984, the Honorable Orrin G. Hatch remarked that the bill intended to "ensure that a 'fresh start' does not become a 'head start'." 1984, *U.S. Code Congr. & Admin. News*, p. 598; see also *In re Ramm Industries, Inc.*, 83 B.R. 815, 825 (Bkrtcy. M.D. Fla. 1988).

[6] See Footnote No. 1, *infra*, at pages 1-2.

of post-petition interest to unsecured creditors.[7] To provide a legal mechanism whereby solvent debtors, such

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[7] *In re Continental Airlines Corp.*, 110 B.R. 276, 280 (Bkrtcy. S.D. Tex. 1989) (Continental was solvent. Thompson was employed as a pilot for Continental. He filed a proof of claim for settling expenses pursuant to his employment agreement. Under Texas law, attorneys' fees are allowed if the claim is based on an oral or written contract. Continental objected and Thompson prevailed. The court granted Thompson attorneys' fees incurred in litigating his claim. The Court stated, " . . . at least as an issue of policy, as in the case of interest, creditors should be entitled to the recovery of attorney fees in instances where the debtor is solvent and they would be entitled to attorney fees under state law for litigation over the validity and amount of their claim." . . . "This Court finds no logical reason to prohibit the allowance of attorney's fees for professional services rendered in successfully establishing a disputed unsecured claim when the debtor is solvent.");

Liberty National Bank and Trust Co. v. George, 70 B.R. 312, 317 (W.D. Ky. 1987) (Adding a claim of $317,759.67 for attorneys' fees incurred for both pre-and-post-petition activities to the secured debt, the creditor became undersecured in the amount of $172, 865.23. The debtor was solvent. The court states, "the bankruptcy court should not have limited Liberty's claim for contractual attorney's fees to the value of the excess collateral, but should have allowed the balance of these fees as an unsecured claim under Section 502(b)(1) (Citations).");

In re Lorenzo Bancshares, Inc., 122 B.R. 270 (Bkrtcy. N.D. Tex. 1991) (After default, the unsecured creditors accelerated their subordinated debentures and filed suit in state court for collection. Thereafter, the Obligor/Debtor filed for protection under the bankruptcy code and the state suit was removed to the bankruptcy court. The creditors prevailed and requested attorneys' fees to which they would be entitled under Texas state law. The Debtor objected in that some of the fees were incurred for preparing a proof of claim, preparing objections to plan and other bankruptcy monitoring services. The Court granted the

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as the FOBIANS, could further increase their substantial net worth by sidestepping an obligation they agreed to would work a grave injustice on creditors. It is undisputed that there were ample assets in the FOBIANS' estate to pay the BANK'S attorneys' fees in full and provide the FOBIANS with a healthy fresh start. The BANK should be granted its claim for attorneys' fees.

III.

REASONS FOR GRANTING THE BANK'S WRIT

The *Fobian* decision is the result of the Ninth Circuit's confusion over the statutory basis for the award of post-petition attorneys' fees in bankruptcy proceedings. In broadly devising a *per se* rule that a contractual attorneys' fees provision is inapplicable when "the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law," the Ninth Circuit went far beyond the language and purpose of the Bankruptcy Code. *In re Fobian, supra,* 951 F.2d at 1153.

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fees stating, "payment of these debentures comes immediately ahead of any payment to or retention of property by the shareholders. Equity demands that the plaintiffs receive the attorney's fees to which they are entitled under Texas law before any distribution is made to or any property is retained by the shareholders in this Chapter 11 proceeding.").

See also In re Sakowitz, Inc., 110 B.R. 268, 270 (Bkrtcy. S.D. Tex. 1989) (The debtor was insolvent. The court did not grant contractual attorneys' fees to the undersecured creditor. Nevertheless, the court stated ". . . This court is of the opinion that attorney fees should be allowed where the debtor is solvent (before and after the allowance) due to policy considerations akin to those with respect to the allowance of interest post-petition (citations omitted)."

Though perhaps not intended, the *Fobian* decision may undermine the clear language and intent of 11 U.S.C. Section 506(b).

Under *Fobian*, whether a creditor's claim for contractual attorneys' fees will be allowed depends upon whether the bankruptcy activities for which the fees were incurred involve either "issues peculiar to federal bankruptcy law" or "basic contract enforcement questions." If the bankruptcy activities for which the fees were incurred involve "issues peculiar to federal bankruptcy law," the creditor will not have a claim for the fees. However, if the creditor's bankruptcy activities involve "basic contract enforcement questions," a claim for fees is added to the existing claim of the creditor. The *Fobian per se* rule neither distinguishes between oversecured and unsecured or undersecured creditors, nor differentiates between solvent and insolvent debtors.

In conflict with the *Fobian* rule, the Second, Fifth, Sixth, Eighth, and Eleventh Circuits, the District Court in the Southern District of New York, and Bankruptcy Courts in the Districts of Northern Texas, Middle Tennessee, Western Wisconsin, and Southern New York have held that an unsecured or undersecured creditor is entitled to a claim for attorneys' fees incurred for post-petition bankruptcy services. These courts did not base their decisions on the analysis advocated in *Fobian*. Instead, they found that the entitlement to those fees was defined and authorized by state law. (See Section A below.).

The District Court of Western Kentucky and the Bankruptcy Courts from the Districts of Southern and Northern Texas are in conflict with *Fobian* for different reasons. These courts granted attorneys' fees to the

unsecured or undersecured creditor for policy reasons, not because they concluded that the litigated issues were "basic contract enforcement actions." Like the FOBIANS, the Texas and Kentucky debtors were solvent. (See Section B below.

Two other bankruptcy decisions from the Southern District of Texas, *In re Sakowitz, Inc.*, 110 B.R. 268, 272 (Bkrtcy. S.D. Tex. 1991) and the Western District of Virginia, *In re Saunders*, 130 B.R. 208, 214 (Bkrtcy. W.D. Va. 1989), denied the undersecured creditors' claims for contractual attorneys' fees. However, these decisions also conflict with *Fobian* in holding that an unsecured creditor is not entitled to a claim for contractual attorneys' fees. These courts concluded that Congress intended to exclude such claims by only providing for fees to oversecured creditors under 11 U.S.C. Section 506(b).

Finally, the *Fobian* decision cannot be harmonized with prior Ninth Circuit rulings. (See Section C below.) Nor does the decision provide any guidance as to which bankruptcy activities involve "issues peculiar to federal bankruptcy law." (See Section D below.) The confusion engendered by the *Fobian* decision prevents the establishment of uniform bankruptcy laws, creates uncertainties, encourages forum shopping and increases, rather than decreases, the cost of bankruptcy administration.

A. *Fobian* Is In Conflict With the Second, Fifth, Sixth, Eighth and Eleventh Circuits and with the District Court of Southern New York and Bankruptcy Courts in the Districts of Southern New York, Northern Texas, Middle Tennessee and Western Wisconsin.

Decisions from the Second, Fifth, Sixth, Eighth and Eleventh Circuits, the District Court of Southern New

York and Bankruptcy Courts in the Districts of Northern Texas, Middle Tennessee, Southern New York, and Western Wisconsin are in conflict with the *Fobian* decision. These courts granted unsecured or undersecured creditors' claims for attorneys' fees incurred in connection with various bankruptcy activities when the contract so provided. The entitlement to such fees was not based on a characterization of the bankruptcy activity as a "basic contract enforcement action" as opposed to activities involving "issues peculiar to bankruptcy law." Instead, these courts reasoned that creditors' claims for attorneys' fees are defined and authorized by state law.[8]

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[8] *In re United Merchants*, 674 F.2d 134, 137 (2nd Cir. 1982) (This case is a pre Bankruptcy Code case in which the Court granted contractual attorneys' fees to the unsecured creditor for monitoring the bankruptcy proceeding, filing a proof of claim and participating in a Plan. The court stated "[t]he validity of a clause in a loan agreement providing for recovery of collection costs upon default is determined by state law- . . . The case law does not support a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy." Responding to the debtor's argument that the new Section 506(b) provides for attorneys' fees to oversecured creditors only, the court stated, "[s]ection 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement.";

LeLaurin v. Frost National Bank, 391 F.2d 687 (5th Cir.), cert. den., 393 U.S. 979, 89 S.Ct. 447, 21 L.Ed.2d 440 (1968) (This too is a case decided under the former Bankruptcy Act. Here, an attorney sued his client seeking attorneys' fees earned from prosecuting the bank's claim on a promissory note against a debtor. The attorney urged that his client was bound by the amount of attorneys' fees determined by the bankruptcy court

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B. *Fobian* is in Conflict With the District Court of Western Kentucky and the Bankruptcy Courts of the Districts of Southern and Northern Texas.

One other District Court decision and two other Bankruptcy Court decisions are in conflict with *Fobian*. In

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in connection with his client's proof of claim against the debtor. However, the Fifth Circuit held that the principle of *res judicata* did not apply in that instance. The significance of that case is the fact that the bankruptcy judge had awarded a $25,000 attorney fee on the *unsecured portion* of the bank's claim.);

In the Matter of Jordan, 927 F.2d 221, 227 (5th Cir. 1991). In this case, the prevailing unsecured creditor was awarded contractual attorneys' fees in a consumer debt nondischargeability proceeding. The *Jordan* court stated, "[w]e do not think that section 523(d) prevents the award of attorneys' fees and costs to creditors so entitled as a matter of contract under state law . . . *To the contrary, 11 U.S.C. Section 523(a)(2)(B) excepts from discharge the whole of any debt incurred by use of a fraudulent financial statement, and such a debt includes state-approved contractually required attorney's fees.") (Emphasis added in original);*

In re Martin, 761 F.2d 1163, 1168 (6th Cir. 1985). (Here the Bank was successful in its nondischargeability action against a consumer debtor. The Court awarded contractual attorneys' fees to the Bank. Recognizing that Congress intentionally provided for reimbursement of attorneys' fees to the prevailing consumer debtor, the Court stated, "[h]owever, creditors are entitled to recover attorneys' fees in bankruptcy claims if they have a contractual right to them valid under state law, which appears to be the case here, as the note itself provided that the Martins would reimburse the Bank for the costs and attorneys' fees necessary to collect the note (citations omitted). The validity of the creditor's claim for attorneys' fees does not depend on whether the obligation is secured (unless state law so provides). . . . We do not think that section 523(d) prevents the

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Liberty National Bank and Trust Co. v. George, supra, 70 B.R. at 317 (W.D. Ky. 1987), *In re Continental Airlines, supra,* 110

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award of attorney's fees and costs to creditors so entitled as a matter of contract under state law.");

In re Morris, 602 F.2d 826, 828 (8th Cir. 1979). (In this pre-Code case, the court granted fees incurred by an undersecured creditor in monitoring the bankruptcy proceeding, pursuing an unsuccessful motion for relief from stay and prosecuting a proof of claims action. The court based its fee award on sweeping language of a fee clause which provided fees for collection costs.);

Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505, fn.3 at 1507, 1509 (11th Cir. 1991) (Here the court granted an unsecured consumer creditor attorneys' fees incurred in non-dischargeability proceeding. The court stated, "[a]fter examining the plain language of Section 523 and the policy of the Bankruptcy Code, in general, and Section 523, in particular, we hold that a creditor successful in a dischargeability proceeding may recover attorneys' fees when such fees are provided for by an enforceable contract between the creditor and debtor.");

In re Ladycliff College, 56 B.R. 765, 769 (S.D.N.Y. 1985) (In this case, the court granted an undersecured creditor contractual attorneys' fees incurred in a proof of claim proceeding. The court found that such an unsecured claim for expenses is not barred by Section 506[b].);

In re Missionary Baptist Foundation of America, Inc., 24 B.R. 970, 971 (Bkrtcy. N.D. Tex. 1982) (Here too the court granted contractual fees incurred in connection with settlement negotiations and a proof of claim to the unsecured creditor. The court stated "[t]he clause providing for attorneys' fees upon default is valid under Texas law and should be enforceable under Federal Bankruptcy law.");

In re Foster, 38 B.R. 639, 642 (Bkrtcy. M.D. Tenn. 1984) (The prevailing unsecured commercial creditor in this case was awarded contractual attorneys' fees in commercial debt

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B.R. at 280 (Bkrtcy. S.D. Tex. 1989), and *In re Lorenzo Bancshares, Inc., supra,* 122 B.R. at 273 (Bkrtcy. N.D. Tex. 1991), the courts allowed claims for attorneys' fees to the unsecured or undersecured creditors. Like the FOBIANS, the debtors were solvent in each of these cases. The Texas and Kentucky courts did not analyze whether the fees were incurred in connection with "basic contract enforcement actions" as opposed to "issues peculiar to federal bankruptcy law." Nor did they hold that claims for

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nondischargeability proceeding. The Foster court stated, "If it is appropriate as a matter of bankruptcy policy to provide for the recovery by honest debtors of attorneys' fees when they are successful in fraud dischargeability proceedings, it would appear to be equally appropriate as a matter of bankruptcy policy to permit honest creditors to recover attorneys' fees which dishonest debtors have contracted to pay. The bankruptcy policy considerations are the same – to insure that the honest do not forfeit their rights out of concern for the expenses of litigation.");

In re A. Tarricone, Inc. 83 B.R. 253 (Bkrtcy. S.D.N.Y. 1988) (Here an unsecured creditor filed a complaint for declaratory relief in bankruptcy court that debtor had no property interest in a leased warehouse. After the creditor obtained a stipulation and consent order in his favor, he requested contractual attorneys' fees as an administrative expense. The court permitted the creditor to file an unsecured claim for attorneys' fees.);

In Re Tri-State Homes, Inc., 56 B.R. 24, 26 (Bkrtcy. W.D. WI 1985) (The debtor here sued the unsecured creditor to have a stock redemption agreement declared null and void. The creditor prevailed and sought to tax fees as costs either under 28 U.S.C. 1920 or to amend the claim to include fees. The court found that litigation fees became part of the debtor's contractual debt and granted leave to file an amended claim. The court stated, "[t]he court found nothing in bankruptcy policy or case law which supported a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy.").

attorneys' fees must be defined and authorized by state law, as in the cases cited in footnote no. 8, above. Instead, these courts granted claims for attorneys' fees incurred in connection with various bankruptcy activities for compelling policy reasons.

C. *Fobian* Cannot Be Harmonized with Prior Rulings of the Ninth Circuit.

In the case of *In the Matter of 268 Limited*, 789 F.2d 674, 678 (9th Cir. 1986), the Ninth Circuit did not question an unsecured or undersecured creditor's *entitlement* to contractual attorneys' fees. Nor did the court condition the award of attorneys' fees on a finding that they were incurred litigating issues involving only "basic contract enforcement questions." The court in *268 Limited* held that 11 U.S.C. Section 506(b) requires a new federal reasonableness standard on post-petition attorneys' fees claimed by oversecured creditors. Applying this new reasonableness standard, the court reduced the fees requested by the creditor to $20,000.00. These fees then were added to the creditor's secured claim. The creditor also was permitted to claim the contractual fees in excess of the $20,000.00 as part of its unsecured claim.

In the case *In re J.F. Hink & Son*, 815 F.2d. 1314, 1318 (9th Cir. 1987), the court awarded the prevailing Trustee/lessor his contractual attorneys' fees that he incurred in litigating an issue involving the enforceability of 11 U.S.C. Section 365(f)(3). Under *Fobian*, such an award arguably would be disallowed.

D. The *Fobian* Rule Provides No Guidance for Determining Which Bankruptcy Activities Involve "Issues Peculiar to Federal Bankruptcy Law."

Under *Fobian*, bankruptcy courts must disallow a creditor's claim for contractual attorneys' fees if the litigated issues involve "issues peculiar to federal bankruptcy law." Unfortunately, *Fobian* provides no guidance to the bankruptcy courts to determine which bankruptcy activities fall within this category. It is this uncertainty that will cause unnecessary litigation and increase the cost of bankruptcy administration. That uncertainty will greatly undermine bankruptcy and appellate courts' attempts to create a uniform system of bankruptcy rules.

Under *Fobian*, bankruptcy activities such as plan litigation, motions for relief from stay, and nondischargeability proceedings apparently would fall into the forbidden category for which the Ninth Circuit will not grant attorneys' fees. *See In re Fobian, supra*, 951 F.2d at 1153.[9] This is in conflict with decisions from the Fifth, Sixth, Eighth, and Eleventh Circuits and from the Bankruptcy Court of the District of Middle Tennessee discussed above.

The Fifth Circuit, in *In re United Merchants, supra*, 674 F.2d at 139 (2nd Cir. 1982) granted an unsecured creditor's claim for attorneys' fees incurred in negotiating a plan and participating in the Chapter 11 proceeding. The

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[9] The *Fobian* case incorrectly describes the litigated issue raised in *In re Coast Trading Co.*, 744 F.2d 686 (9th Cir. 1984). (*Coast Trading* did not involve a nondischargeability action, but an action to rescind or disavow a contract.) *See also In re Fulwiler*, 624 F.2d 908 (9th Cir. 1980). (This case is a pre-Code nondischargeability proceeding, not an action under Section 546 as *Fobian* asserts.)

unsecured creditors' claims for fees incurred in non-dischargeability proceedings were granted in *In the Matter of Jordan, supra,* 927 F.2d 221 (5th Cir. 1991); *In re Martin, supra,* 761 F.2d 1163 (6th Cir. 1985); *Transouth Financial Corp. of Florida v. Johnson, supra,* 931 F.2d 1505 (11th Dist. 1991), and *In re Foster, supra,* 31 B.R. 639 (Bkrtcy. M.D. Tenn. 1984). Finally, the Eighth Circuit in *In re Morris, supra,* 602 F.2d at 828 (8th Cir. 1979) granted unsecured creditors' claims for attorneys' fees incurred in connection with motions for relief from stay.

IV.

THE AUTHORITIES CITED BY THE NINTH CIRCUIT IN *FOBIAN* DO NOT SUPPORT ITS *PER SE* ATTORNEYS' FEES RULE

The court in *Fobian* relied on the following cases in rendering its decision: *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.),* 744 F.2d 686, 693 (9th Cir. 1984); *Grove v. Fulwiler (In re Fulwiler),* 624 F.2d 908, 910 (9th Cir. 1980); and *Johnson v. Righetti (In re Johnson),* 756 F.2d 738, 741-42 (9th Cir. 1985). However, these cases do not provide the requisite foundation for *Fobian's* sweeping *per se* rule that absent bad faith or harassment, attorneys' fees will not be awarded "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law."

In *Coast Trading, supra,* 744 F.2d at 693, the court based its denial of attorneys' fees on Oregon Rev. Stat. Section 20.096[10] and on the narrow language of the

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[10] This section provides as follows: "In an action or suit on a contract, where such contract specifically provides that attorney fees and costs incurred to enforce the provisions of the

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attorneys' fees clause and Section 20.096 were found to limit reimbursement of fees to those incurred in an action to "enforce a contract." *Coast Trading* was an action to rescind and disavow, not enforce, the contract. *Id.*

The *Fulwiler* case was a nondischargeability action decided under the former Act. The debtor prevailed and requested attorneys' fees under the unilateral attorneys' fees provision in the loan documents and under Oregon Rev. Stat. Section 20.096. Again, the court found that the statute did not apply. Under federal law, the court had no authority to make the unilateral fee provision reciprocal. *In re Fulwiler, supra,* 624 F.2d at 910.

Finally, in *Johnson, supra,* 756 F.2d, 741-742, the prevailing debtor requested reimbursement of attorneys' fees under California Civil Code Section 1717.[11] Like its Oregon counterpart, Section 1717 applies only to actions on contracts, where the contract specifically provides for an award of attorneys' fees incurred to enforce that contract. The court held that motions for relief from stay are not actions to "enforce a contract."

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contract shall be awarded to one of the parties, the prevailing party, whether that party is the party specified in the contract or not, at trial or on appeal, shall be entitled to reasonable attorney fees, in addition to costs and disbursements."

[11] This section provides as follows: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements . . . "

In *In re Johnson* and *In re Fulwiler,* the debtors sought recovery of their attorneys' fees, not the creditors. The debtors sought to enforce state "reciprocity" provisions for contracts containing unilateral attorneys' fees provisions. Finding the state statutes inapplicable, these courts concluded that there was no reciprocity. In *Fobian,* the *creditor* requested an award of attorneys' fees. The distinction is significant and controlling. A creditor may be allowed its reasonable fees as part of its claim in a bankruptcy under 11 U.S.C. Section 502(b).

V.

CONCLUSION

The *amicus curiae* applicants pray that the BANK's Petition for Writ of *Certiorari* be granted to review the judgment of the Court of Appeals for the Ninth Circuit in *In re Fobian.* In the event that the BANK's Petition is granted, the *amicus curiae* applicants pray that the judgment of the Court of Appeals as to the award of attorneys' fees as part of the BANK's claim be reversed and that the case be remanded for proceedings consistent with this Court's ruling.

Dated: June 2, 1992.

Respectfully submitted,

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